

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

HAROLD PACKARD,

Plaintiff

v.

**LOUIS W. SULLIVAN, M.D.,
Secretary, United States Department
of Health & Human Services,**

Defendant

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Civil No. 90-0037 P

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS

The plaintiff, an applicant for Social Security Disability Insurance benefits, seeks judicial review in this court of an adverse decision of the Secretary. Before the court is the Secretary's motion to dismiss the plaintiff's complaint for lack of subject matter jurisdiction.

The procedural history may be briefly summarized. On June 29, 1988 the plaintiff requested a hearing before an Administrative Law Judge on his August 6, 1987 application for a period of disability and disability insurance benefits. On July 29, 1988 an Administrative Law Judge dismissed the hearing request on res judicata grounds. The dismissal order was accompanied by a notice of even date which was sent to the plaintiff and his attorney advising of the plaintiff's right to request review by the Appeals Council within 60 days after receipt of the notice. The notice further indicated that receipt within five days of July 29, 1988 would be presumed unless a showing is made to the contrary. The plaintiff did

not file a request for review until December 22, 1988. Finding no good cause to extend the time for filing, on April 12, 1989 the Appeals Council dismissed the plaintiff's request for review as untimely. By letter dated July 5, 1989 the plaintiff, through his attorney, requested the Administrative Law Judge to reopen the case. Treating the request as a motion to vacate his earlier order of dismissal, the Administrative Law Judge denied the motion on July 26, 1989 as untimely, noting that the applicable regulation, 20 C.F.R. ' 404.960, reposes no discretion in the Administrative Law Judge to extend the time even upon a finding of good cause. On August 14, 1989 the plaintiff filed a request for Appeals Council review of the Administrative Law Judge's denial of his motion to vacate. On January 23, 1990 the Appeals Council, finding no basis upon which to consider the current request for review, dismissed the same and observed that the Administrative Law Judge's original order of dismissal remained final and binding. The plaintiff filed his complaint in this court on February 9, 1990.

The plaintiff asserts jurisdiction based on 42 U.S.C. ' 405(g) which reads in pertinent part as follows:

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow.

The Secretary argues the action of which the plaintiff seeks judicial review, to wit the January 23, 1990 dismissal by the Appeals Council of the plaintiff's August 14, 1989 request for review, is not a "final decision of the Secretary made after a hearing" within the meaning of ' 405(g) because the plaintiff failed to exhaust his administrative remedies with respect to his claim for benefits and because the denial of his motion to vacate the original dismissal is not a type of agency action of which judicial review is provided by ' 405(g). Although the plaintiff has filed an objection to the Secretary's motion to dismiss, his supporting memorandum does not address the jurisdictional issue presented by the

motion, but rather simply incorporates a letter of a branch manager of the Social Security Administration articulating his disagreement with the Administrative Law Judge's original dismissal on res judicata grounds.¹

The Supreme Court has characterized the exhaustion requirement as "a prerequisite to jurisdiction" under ' 405(g). *Heckler v. Ringer*, 466 U.S. 602, 617 (1984). The Court has explained:

that the exhaustion requirement of ' 405(g) consists of a nonwaivable requirement that a "claim for benefits shall have been presented to the Secretary" and a waivable requirement that the administrative remedies prescribed by the Secretary be pursued fully by the claimant.

Heckler v. Ringer, 466 U.S. at 617 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976)). Social Security Administration Regulations No. 4 prescribe the administrative procedures which a Social Security Disability Insurance benefit claimant must follow in order to obtain a "final decision of the Secretary." As the Secretary correctly observes, "[o]nly claims for benefits which are pursued through the initial, reconsideration, hearing and Appeals Council levels in a timely fashion and have received a final decision of the Secretary can be reviewed under [' 405(g)]." Defendant's Brief in Support of Motion to Dismiss Plaintiff's Complaint at 7. *See* 20 C.F.R. ' ' 404.909, 404.933, 404.936, 404.955, 404.967, 404.968, 404.981. *See also* 20 C.F.R. ' ' 404.957, 404.959, 404.960.

Here, the plaintiff failed to file a timely request for Appeals Council review of the Administrative Law Judge's July 29, 1988 order of dismissal. *See* 20 C.F.R. ' 404.968. Likewise, he failed to timely file with the Administrative Law Judge his motion to vacate the Administrative Law Judge's earlier order. *See* 20 C.F.R. ' 404.960. Thus, even though the plaintiff's request for Appeals

¹ In this regard the plaintiff has failed to satisfy the requirement of Local Rule 19(c) that an objection be accompanied by a memorandum of law which includes citations of supporting authorities and any affidavits and other documents setting forth or evidencing facts on which the objection is based.

Council review of the Administrative Law Judge's second denial order was itself "timely" filed, the Appeals Council properly concluded that there was no basis for consideration of the request.

Moreover, the Supreme Court has held that ' 405(g) does not authorize judicial review of discretionary agency action. In *Califano v. Sanders*, 430 U.S. 99 (1977), the Court considered the appeal of a Social Security Disability claimant who failed to seek judicial review of the Secretary's final decision finding him ineligible for benefits, but who, seven years later, filed a second claim asserting the same bases for eligibility. At the appropriate stage of review an Administrative Law Judge determined that the claim was barred by res judicata but chose to treat it as an application to reopen the plaintiff's original claim. After reviewing both claims and the evidence supporting them the Administrative Law Judge denied the application to reopen and dismissed the claim. The Court ruled that ' 405(g) "limits judicial review to a particular type of agency action, a 'final decision of the Secretary made after a hearing.'" *Id.* at 108 (emphasis supplied). Because a petition to reopen a prior final decision may be denied without a hearing, and was in that case, the Court concluded that there was no federal court jurisdiction under ' 405(g) to review the Secretary's denial of the petition to reopen. The Court went on to observe that:

[A]n interpretation that would allow a claimant judicial review simply by filing -- and being denied -- a petition to reopen his claim would frustrate the congressional purpose, plainly evidenced in [' 405(g)], to impose a 60-day limitation upon judicial review of the Secretary's final decision on the initial claim for benefits. Congress' determination so to limit judicial review to the original decision denying benefits is a policy choice obviously designed to forestall repetitive or belated litigation of stale eligibility claims. Our duty, of course, is to respect that choice.

Id. (citation omitted); see also *Colon v. Secretary of Health & Human Services*, 877 F.2d 148, 152-53 (1st Cir. 1989). The reasoning of *Sanders* is clearly applicable to this case. The plaintiff cannot circumvent the regulatory limitations on substantive claim review merely by filing an out-of-time

motion to vacate a res judicata dismissal of an application for hearing followed by a "timely" request for Appeals Council review of the denial of the motion.

Because the plaintiff seeks a review of a decision of the Secretary which was not made after a hearing and such decision was in any event not final due to the plaintiff's failure to have exhausted his administrative remedies, and because I am satisfied that there is no other jurisdictional basis which sanctions consideration of the plaintiff's complaint in this court, *see Heckler v. Ringer*, 466 U.S. at 615 (no federal-question jurisdiction if claim "arises under" the Social Security Act); *Califano v. Sanders*, 430 U.S. at 104-07 (APA does not afford implied grant of subject-matter jurisdiction permitting federal judicial review of agency action), I recommend that the Secretary's motion to dismiss for lack of subject matter jurisdiction be GRANTED.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 8th day of June, 1990.

***David M. Cohen
United States Magistrate***